No. 82-111

In The

Supreme Court of the United States

October Term, 1982

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ANTHONY PROVENZANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where a trial judge reveals during post-conviction proceedings a longstanding and extrajudicial bias against a defendant, does not the appearance of justice standard embodied in 28 U.S.C. §455 require not only recusal from those proceedings but a new trial as well?

2. Whether testimony to be false within the contemplation of *United States v. Agurs*, 427 U.S. 97 (1976), must be literally and intentionally false or whether it is sufficient that it create a false impression on the jury?

3. Whether non-disclosed exculpatory evidence going not only to the credibility of the main government witness but to the very truth of the charges against petitioner warrant a new trial under even the most stringent of the *Agurs* tests?

4. Does not the rule of *Larrison v. United States*, 24 F. 2d 82 (7th Cir. 1928), require a new trial in federal courts where a material prosecution witness gives false or misleading testimony which is not discovered until after trial, and without which the jury might have reached a different result?

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No.

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October Term, 1982

ANTHONY PROVENZANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Anthony Provenzano prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the District of New Jersey denying petitioner a new trial and denying his application to recuse the district judge.

OPINIONS BELOW

The unreported opinion of the district court may be found in the appendix to this petition (6a).[1] The court of appeals

1. "A" references are to the appendix to this petition. References designated "a" are to the appendix submitted to the United States Court of Appeals for the Third Circuit.

affirmed by judgment order dated April 14, 1982 (3a) and on May 7, 1982 a timely application for rehearing with suggestion for rehearing *en banc* was denied (1a).

JURISDICTION

The date of judgment of the United States Court of Appeals for the Third Circuit was April 14, 1982. A timely petition for rehearing was denied on May 7, 1982. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States and Title 28 U.S.C. §455 are invoked in this case. These constitutional and statutory provisions are set out in the appendix hereto (33a).

STATEMENT OF THE CASE

Petitioner, along with several others, was indicted for conspiracy and substantive violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962. After a three week trial he and his co-defendants were convicted on both counts of the indictment. Thereafter, petitioner's conviction was affirmed, *United States v. Provenzano*, 620 F. 2d 985 (3rd Cir. 1980), and this Court denied his petition for a writ of certiorari. 449 U.S. 899 (1980).

Petitioner then filed a motion for a new trial based upn newly discovered evidence (21a-32a). The matter was initially argued on May 11, 1981 (201a-288a) after which, as a result of certain remarks made by the trial judge during oral argument, petitioner moved for recusal of the judge (289a). After a subsequent

argument on June 22, 1981 (290a-323a) the motion for recusal was denied (319a-320a).

The underlying facts upon which petitioner's conviction was based need not be set out at length here. They are fully discussed in the earlier opinion of the court of appeals affirming the conviction. The facts relating to the new trial motion, which is the basis of the present appeal, fall into three separate categories, as follows:

1. The Non-disclosure of Material Relating to the FBI Florida Investigation.

Ralph Picardo was the key to the Government's case against Provenzano, one which the district judge himself described as "rather sparse" (96a). Picardo testified to only a few contacts with Provenzano concerning the subject matter of the indictment, and was generally quite vague about the dates, times and places where these meetings took place. He did, however, get specific in one instance, claiming that he met and spoke with Provenzano at the Americana Hotel in Florida in October or November of 1973 (61a-64a). In addition, there was testimony from Mary Ann Hart, one of Picardo's girlfriends, that he told her of his trip to Florida and, when he returned, displayed some new clothes that he had purchased while there (93a-94a). The defense called FBI Agent Roy Thomas Smith, Jr. as a witness for the purpose of impeaching Picardo's credibility with respect to his claimed 1973 trip to Florida and meeting there with Provenzano. The questioning of Agent Smith focused on his unsuccessful search for registration cards at the Americana covering the October-November 1973 period, based upon a February 4, 1976 report which he had filed[2] (26a) covering those activities, which was

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2. The report actually states that the review took place on February 4, *1975* but it is conceded by all parties that that was a typographical error.

turned over to the defense in response to a request by Provenzano for so-called *Brady* material.

However, in a subsequent trial in New York,[3] in which Picardo was also a witness and in which Provenzano's trial counsel in this case was also defense counsel, he received, again pursuant to a *Brady* request, several additional items not received in this case[4] including: (1) an additional report of Agent Smith concerning his interview with one Martin Wexler and a review of records at Wexler's clothing store in the Americana Hotel on January 15, 1976 (27a); (2) a report of FBI Agent John S. Sullivan concerning his review of certain airline records on January 23, 1976 (28a).

Those reports revealed that in addition to the search for registration cards at the Americana, Smith had also interviewed the owner of a clothing store in the hotel and reviewed his records in an effort to determine whether Picardo or Provenzano had made purchases there in the relevant time period, the fall of 1973. That search was based upon information given to the Government by Picardo that he had bought clothes at the store while at the Americana and had charged the purchases to Provenzano's account. In addition, again based on information supplied by Picardo, a search was made by Agent Sullivan of airline records covering the time when Picardo made his trip. Both the clothing

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3. *United States v. Tieri*, Cr. 80-0381 (S.D.N.Y.).

4. Both of Provenzano's trial counsel submitted affidavits (55a-56a) that they had never seen or received the additional reports, while Government trial counsel submitted an affidavit suggesting that they must have received them (34a-35a). The district court did not take any evidence on the issue but simply proceeded on the assumption that the material in question had not been turned over (335a).

store and airline search provided no confirmation of Picardo's story.

2. Picardo's Perjurious Testimony.

The central attack on Picardo's credibility revolved around the benefit he sought, or hoped, to obtain from the authorities with respect to his outstanding indictment for murder in New Jersey. Convicted of second degree murder in February 1975 and sentenced to seventeen to twenty years in prison, Picardo's conviction was reversed in June 1977 and remanded for a new trial. Under cross-examination by counsel for Provenzano, Picardo testified in this trial as follows:

> "Q. Is it not a fair statement that it's your hope that you'll never have to stand trial for that murder case? A. That's correct, sir." (83a).

However, in 1980, testifying in the trial of *United States v. Tieri*, Cr. 80-0381, in the Southern District of New York, Picardo substantially and seriously changed his testimony concerning the nature of his deal with the authorities concerning a possible retrial of the murder case. Under direct examination by the Government attorney, the following testimony was elicited:

> "Q. Mr. Picardo, have you also cooperated with the State of New Jersey? A. Yes, I have.
>
> Q. In connection with that cooperation, do you have an understanding with respect to your retrial on the murder charge? A. Yes, I do.
>
> Q. What is your understanding? A. That I won't be retried again." (160a).

Again, on cross-examination by counsel for Tieri, the following colloquy took place between Picardo and the court:

> "THE COURT: Let me try to cut through this. As of April '77 you had an appeal pending your murder conviction, right?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: I think the question is at this time did you believe that if your appeal was successful and even if in terms the higher court ordered a retrial did you understand that in fact you were not going to be retried?
>
> THE WITNESS: The answer to that, sir, is yes."

Subsequently, in March 1981, testifying in the case of *United States v. Nunzio Provenzano, et als,* Cr. No. 80-315 (D.N.J.), Picardo testified as follows:

> "Q. Between June 17, 1977 and the present time, which is March 24, 1978, is your case scheduled for retrial? A. No.
>
> Q. You don't want it to be, do you? A. I have an agreement not to be.
>
> Q. You don't expect to be retried for the murder of that 19 year old boy, is that right? A. That is correct.

• • •

Q. Did you state that you had an agreement not to be retried on the murder case? A. Yes, I said that, but not by the Federal Government.

Q. With whom did you have that agreement? A. State Government.

Q. When was that agreement arrived at? A. I don't know the exact date.

Q. Would it have been several years ago? A. Yes.

Q. As long as two and a half or three years ago? A. Sir, I just said I don't know.

Q. Good enough. [192a]

* * *

Q. Mr. Goldberg amoment [sic] ago asked you a question as to an agreement you reached with the authorities of the State of New Jersey that you would not be prosecuted.

When do you say you reached that agreement? A. Sir, I don't know the exact date, and there is no way that I can determine the exact date in time.

Q. Who do you say you reached such agreement with? A. The State Attorney General's Office." (193a-194a).

3. The District Judge's Prejudice Against Provenzano.

The facts relating to this aspect of the present appeal came to light during the initial argument of the new trial motion on May 11th, when the court made the following remarks:

> "THE COURT: If I grant a hearing in this case and you and Mr. Edelbaum have all the hay you want and take up another week or ten days and then you lose, what's the next lawyer going to do for Tony Provenzano to get a hearing next year or the year after? Because if you've got anything in the background I want to know it now so I can get it all over at once.
>
> I don't want him to ruin my judicial career like he did Judge Shaw's." (261a).

Later, the court made the following revelation:

> "THE COURT: I sat on the Ethics Committee in Hudson County which involved a lawyer who was a witness in the Provenzano case before Judge Shaw, Judge, late Judge Shaw, named Michael Comenalli. I was on the Ethics Committee for years. And we had a complaint about Mr. Comenalli, he had testified, apparently, or it came up in the negotiations that he was getting money at Provenzano's behest from Dorn on a monthly retainer. Never did any service for Dorn. At the same time he was a part-time assistant in the Hudson County Prosecutor's Office.
>
> I think I got the facts straight. Year after year we sat on the Comenalli ethics complaint. Why?

> Because there was always some post-conviction matter goint [sic] on before Judge Shaw involving the 1960 or '61 conviction of Anthony Provenzano.
>
> Now is there anything more down the road, or is this it?" (273a-274a).

At the argument on the subsequent motion the court continued in this same vein, detailing at length the various judicial proceedings by Provenzano arising out of his 1963 conviction which delayed processing of the Comenalli ethics matter by the Hudson County Ethics Committee of which the district judge was a member (315a-317a).

REASONS FOR GRANTING THE WRIT

This petition raises substantial issues concerning the correct interpretation and application of this Court's decision in *United States v. Agurs*, 427 U.S. 97 (1976), in a particularly clear and compelling factual context. The case also raises the issue, never before addressed by this Court, as to whether the so-called *Larrison* rule, *Larrison v. United States*, 24 F. 2d 82, 87 (7th Cir. 1928), sets forth the proper standard by which federal courts are to judge new trial motions based upon alleged perjury by a critical government witness.

In addition, going to the very heart of this Court's supervisory power, is the issue presented herein of the trial court's extrajudicial prejudice against petitioner, which asks this Court to consider, for the first time, the 1974 liberalizing amendment to the disqualification statute, 28 U.S.C. §455.

I.

Based upon comments made by the trial court during argument on the new trial motion, evidencing a longstanding extrajudicial bias against petitioner, the trial judge should have recused himself not only from the new trial proceeding but from the original trial as well, and his participation therein requires a new trial.

At the oral argument of petitioner's new trial motion, the district judge gave vent to what was clearly a longstanding and extrajudicial prejudice against petitioner. The failure of the court of appeals to recognize this fact seriously undermines the policy of 28 U.S.C. §455, as liberalized by its 1974 amendment, and conflicts with interpretations of the statute in its own and other circuits.

There is no doubt whatsoever, from the trial court's own words, that as a result of sitting on a state ethics committee in the 1960's, he came to the conclusion that petitioner was able to perpetuate the appeals from his 1963 conviction before the late Judge Robert Shaw "beyond all tolerance" (250a-251a). Without any basis in fact, the district judge went on to express the view, obviously formed many years ago, that petitioner was responsible for ruining the "judicial career" of Judge Shaw, an occurrence which the trial judge was not going to let happen to him (261a).

Whatever may have caused the court to express these feelings in 1981 is not relevant. The only important fact is that they were expressed and represented a personal opinion formed outside the judicial arena. 18 U.S.C. §455 was amended in 1974 to render the grounds for disqualification of a trial judge broader than they had been previously under that statute or its companion, 28 U.S.C. §144. *Ritter v. United States*, 540 F. 2d 459, 462 (10th Cir. 1976).

The amended, present version of the statute was designed to substitute a "reasonable man" test for the former, subjective, "in the opinion of the judge" test, and also to overrule the so-called "duty to sit" decisions. *Davis v. Board of School Commissioners of Mobile County*, 517 F. 2d 814 (5th Cir. 1975). By adopting the "appearance of justice" standard, the statute "codally reflects our fundamental notion of a fair trial before a neutral empire." *Adams v. United States*, 302 F. 2d 307, 311 (5th Cir. 1962). As Judge Brown said there, the administration of justice requires not only that "proceedings be proper, but that they appear to be . . ." *Id.* at 310. And as the Third Circuit itself noted some years ago, the judge who presides over a trial must not only be impartial but must have the "appearance of a detached impartiality." *Rapp v. Van Dusen*, 350 F. 2d 806, 812 (3rd Cir. 1965). As Justice Frankfurter put it for this Court, "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact." *Public Utilities Commission v. Pollock*, 343 U.S. 451, 467 (1952).

The test under §455 is not whether an appellate court feels that the district judge is biased, but whether a reasonable "man on the street" might entertain a "reasonable doubt" as to his impartiality. *Potashnick v. Port City Construction Co.*, 609 F. 2d 1101, 1111 (5th Cir. 1980); *United States v. Cowden*, 545 F. 2d 257, 265 (1st Cir. 1976).

How can one doubt that a reasonable man, hearing the comments of the district judge on May 11, 1981, would not entertain a reasonable doubt as to his impartiality toward petitioner based upon pre-existing views which were developed long before his ascendancy to the federal bench and unconnected to the trial at which he presided? It seems inescapable that the court of appeals could only have applied an erroneous legal standard in resolving this issue, the facts being so clear. The court's comments were not only unwarranted, since it had no personal knowledge

of the events of the post-conviction proceedings arising out of the 1963 conviction, but were also without any basis in fact as to how those protracted proceedings ruined the judicial career of Judge Shaw. If the trial judge's views, as thus expressed, had been known before the trial, he certainly should not have presided. His failure to reveal that bias now requires a new trial, notwithstanding that the verdict here was returned by a jury. *United States v. Brown*, 539 F. 2d 467 (5th Cir. 1976); *United States v. Thompson*, 483 F. 2d 527 (3rd Cir. 1965); *State v. Brown*, 602 P. 2d 478 (Ariz. 1979).

This Court has not had occasion to address the issue of judicial disqualification under the 1974 amended version of §455. It should take this opportunity to make clear its adherence to the appearance of justice standard embodied therein and reflecting the deepseated and longstanding principle noted in *United States v. Brown, supra:*

> "The truth pronounced by Justinian more than a thousand years ago that 'Impartiality is the life of justice,' is just as valid today as it was then."

Public confidence in the judicial system is at stake when any criminal defendant, whether notorious or not, is convicted before and sentenced by a judge whose impartiality is placed in serious doubt. Where a court of appeals does not even deal with the issue at all, much less disposing of it in a reasoned manner, the obligation of this Court, we suggest, is even greater. Review should be granted here to insure faithful compliance with the view expressed by this Court in *In re Murchison*, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But

> our system of law has always endeavored to prevent even the probability of unfairness . . . . To perform its high function in the best way 'justice must satisfy the appearance of justice' Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11, 16 (1954)."

II.

The decision below seriously misapplied the rule of *United States v. Agurs*, 427 U.S. 97 (1976).

Under any of the three tests set out by this Court in *United States v. Agurs*, 427 U.S. 97 (1976), a new trial was warranted here.

The evidence in question here, which the trial court assumed had not been turned over to defense counsel, went not merely to credibility but to the very heart of the Government's case against Provenzano; to the pivotal issue of guilt or innocence. This case rested upon Picardo. If he were to be disbelieved, the Government's case unquestionably would have fallen. More importantly, this evidence, concerning his trip to Florida, was one of the few instances where Picardo became specific enough to subject himself to contradiction, as compared to other vague references to conversations or meetings with Provenzano (*compare* 61a-64a *with* 67a and 68a). The alleged visit to Florida supplied one of the few threads holding Provenzano to the fabric of the case, providing one of the crucial "links in the chain" upon which the Government and the court relied in concluding that the evidence against him was even sufficient to warrant submission of the case to the jury (96a-99a). As the summations indicated, all counsel deemed this meeting to be of the utmost significance (144a-151a).

When FBI Agent Smith was called as a defense witness at trial to testify concerning his fruitless search for registration cards

at the Americana, his answers can be seen as a calculated effort to mislead defense counsel into believing that he had *only* looked for such registration records and had done nothing else in an effort to verify Provenzano's presence at the hotel. In response to a request that he "go to the Americana Hotel and attempt to verify that these individuals had indeed stayed at the Americana at that approximate date" (111a), Smith testified that in an effort to make that determination, he went to the hotel and looked through their registration cards for the period in question (112a). Smith never mentioned anything about the search for clothing records, which was based upon information given to the Government by Picardo that he had bought clothing in the specific store and had charged the purchase to Provenzano's account (266a, 278a).

Smith's testimony as to his actions at the Americana, which the Government itself sought to impeach by suggesting that his search for registration records was not very complete (115a-116a), was at the least misleading; at best it was false. Thus, we suggest, the first tier of the *Agurs* test is implicated here: the undisclosed evidence is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103. As this Court has previously said, it is not necessary that the prosecution affirmatively solicit false evidence, it is sufficient if it allows such testimony "to go uncorrected when it appears" *Napue v. Illinois*, 306 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150, 153 (1972). Several courts of appeals have held that a requirement for false testimony does not mean that it must be literally false. It is sufficient if the evidence is intended to give the jury a false impression. *United States v. Anderson*, 574 F. 2d 1347, 1355 (5th Cir. 1978); *Campbell v. Reed*, 594 F. 2d 4 (5th Cir. 1979); *United States v. Bryant*, 439 F. 2d 642, 650 (D.C. Cir. 1941). It is for that reason that the district court's reference to the perjury statute, 18 U.S.C. §1621, and *Bronston v. United States*, 409 U.S. 352 (1972), and its conclusion that "Smith certainly testified within the letter of the truth" (335a),

were far off the mark. By affirming without opinion, the court of appeals has tacitly approved the trial court's serious misconception of the proper standard. Here, Smith's testimony clearly had the capacity to mislead the jury. This Court has never before considered whether the false testimony required to invoke the lowest of *Agurs* standards means testimony which is intentionally and literally false or whether an objective, false impression standard should be sufficient. This case presents an apt vehicle for such a determination.

Nonetheless, petitioner suggests that the evidence at issue here warranted a new trial under the second or even the third and strictest of the *Agurs* standards. Since there was a specific request here for information reflecting adversely upon Picardo's credibility, the second *Agurs* test would require that the non-disclosed evidence "might have affected the outcome of the trial." 427 U.S. at 104. For the reasons discussed above, there should be little doubt that the petitioner met this burden. Indeed, petitioner would urge that the critical nature of the Florida trip when combined with the pivotal nature of Picardo's testimony in this case, would have created a "reasonable doubt that did not otherwise exist," 427 U.S. at 112, the most stringent of the *Agurs* tests, employed where the defendant has made only a non-specific request, or none at all. The trial court's conclusion that this evidence would have been "merely repetitious and cumulative" (336a), flies in the face of the entire record, including the court's own comments during trial concerning the strength of the Government's case against Provenzano (96a). If a jury had believed that the Florida trip had not occurred, the outcome of this trial would have been quite different.

III.

False testimony by the main Government witness warrants a new trial under the *Larrison* rule.

Ralph Picardo made a career out of testifying against petitioner and his family in return for assurance that he would never go to prison, or indeed stand trial again, for his involvement in a murder which resulted in a 1975 conviction and seventeen-to-twenty-year sentence. As noted above, Picardo, when questioned about his "deal" with New Jersey authorities concerning eventual retrial on the murder charges, has repeatedly changed his testimony. Beginning with testimony in June 1978, in a New York murder prosecution of petitioner, that he was simply "awaiting trial" on the murder charges (197a-200a), Picardo testified in this case that it was his "hope" that he would never be retried (83a); in a later trial that it was his "understanding" that he would not be retried (160a, 172a-173a) and most recently that he actually had an "agreement" not to be retried (190a-191a). This understanding or agreement was, of course, at the heart of Picardo's motivation to testify and lay at the core of all defense arguments as to his bias.

If Picardo's testimony as to his mere "hope" in this case was false, a new trial would be warranted under the oft-cited rule of *Larrison v. United States*, 24 F. 2d 82, 87 (7th Cir. 1928), recognized in many circuits, *United States v. Myers*, 484 F. 2d 113, 116 (3rd Cir. 1973); *United States v. Briola*, 465 F. 2d 1018, 1022 (10th Cir. 1972); *United States v. Mackin*, 561 F. 2d 958, 961 (D.C. Cir. 1977), but criticized elsewhere. *United States v. Stofsky*, 527 F. 2d 237, 245-246 (2nd Cir. 1975); *United States v. Krasny*, 607 F. 2d 840, 846 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980). That rule states that where a court is reasonably well-satisfied that testimony given by a material witness is false, that without it the jury might have reached a different result and

that the defendant did not know of the falsity until after the trial, a new trial is required.

Here, Picardo's testimony was false, again in the sense that it was bound to create a false impression upon the jury. Obviously, if one has an agreement not to be retried, he must of course "hope" that he will not be retried, *i.e.*, that the agreement will be lived up to. In that sense Picardo's testimony here may have been literally true. But such an approach would rob the rule of its vitality and would permit an artful witness, as Picardo has proven himself to be, to escape the rule's sanction unscathed. If Picardo knew he had an "agreement" his response that he had a "hope" was not honest and should be countenanced. If the *Larrison* rule is the correct one in such situations it certainly should apply here. Any other result would permit a grave injustice to be perpetrated.

CONCLUSION

For the reasons set forth herein it is urged that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

HARVEY WEISSBARD
Attorney for Petitioner

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2889

UNITED STATES OF AMERICA

v.

ANTHONY PROVENZANO,

Appellant

(Criminal No. 79-00072-01 — D.N.J. — Newark)

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges,* and STAPLETON, *District Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated

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* Walter K. Stapleton, Judge of the United States District Court for the District of Delaware, sitting by designation.

in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Chief Judge

Dated: May 7, 1982

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2889
No. 81-2890

UNITED STATES OF AMERICA

v.

ANTHONY PROVENZANO,

Appellant in No. 81-2889

UNITED STATES OF AMERICA

v.

THOMAS ANDRETTA,

Appellant in No. 81-2890

(Criminal No. 79-00072-01 — D.N.J. — Newark)

Submitted Under Third Circuit Rule 12(6)
April 13, 1982

Judgment Order

BEFORE: SEITZ, *Chief Judge*, ADAMS, *Circuit Judge*, and STAPLETON, *District Judge.**

After consideration of the contentions raised by appellants, to-wit, (1) the non-disclosed exculpatory material and the false testimony at trial relating to that material mandate a new trial, (2) evidence of Picardo's perjury as to his understanding concerning retrial on his murder indictment warrants a new trial or, alternatively, an evidentiary hearing, and (3) based upon comments made by the trial court during the May 11, 1981, new trial motion argument, the trial judge should have recused himself from not only the new trial proceeding but the original trial as well, and a new trial should be ordered, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/ Seitz
Chief Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Apr. 14, 1982

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* Walter K. Stapleton, Judge of the United States District Court for the District of Delaware, sitting by designation.

Judgment Order

Certified as a true copy and issued in lieu of a formal mandate as to No. 81-2889 on May 17, 1982.

Test:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States
Court of Appeals for the Third
Circuit

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 79-72

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY PROVENZANO, et al.,

Defendants.

ORIGINAL FILED SEP. 4, 1981
Angelo W. Locasio, Clerk

Appearances:

William W. Robertson, Esq.
United States Attorney
BY: Jeffrey Speiser, Esq.
Assistant United States Attorney
(Attorney for the Government)

Harvey Weissbard, Esq.
20 Northfield Avenue
West Orange, New Jersey 07052
and
Maurice Edelbaum, Esq.
110 E. 35th Street
New York, New York 10016
(Attorneys for Defendant Provenzano)

Opinion

John L. Pollok, Esq.
477 Madison Avenue
New York, New York 10022
(Attorney for Defendant Thomas Andretta)

Donald R. Conway, Esq.
75 Essex Street
Hackensack, New Jersey 07601
(Attorney for Defendant Stephen Andretta)

MEANOR, District Judge.

It is quite certain that this nation's founding fathers, the framers of our Federal Constitution and the Bill of Rights, never envisioned that the right of a criminal defendant to a speedy and public trial in an arena where witnesses could be confronted by cross-examination, would evolve into merely a dress rehearsal for a long-running soap opera of post-conviction relief. The longer such a drama runs, the less faith society has in a system which appears never to give justice its due.[1]

Just as "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused," *Barker v. Wingo*, 407 U.S. 514, 519

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1. *See Coleman v. Balkcom*, No. 80-5985, *on denial of cert.*, 49 U.S.L.W. 3803 (April 28, 1981) (Rehnquist, J., dissenting), where Justice Rehnquist urged the Court to grant certiorari in a death penalty case in order to conclude "endlessly drawn out legal proceedings." 49 U.S.L.W. at 3805. Justice Rehnquist argued that it makes a "mockery of our criminal justice system" when a convicted criminal defendant continues to get multiple "bites at the apple" in various courts seeking constitutional error, after his trial and sentence have been affirmed upon appellate review. *Id.*

(1972), so is there a societal interest in the finality of judgments which result from those speedily provided trials. A jury's guilty verdict at a trial provided within the parameters of both the sixth amendment's speedy trial clause and the Speedy Trial Act of 1974, 18 U.S.C. §3161 *et seq.*, is meaningless to society when endless post-conviction motions to attack collaterally facets of the trial operate to stay the final judgment into the distant future. It is indeed ironic that a speedy trial which results in a guilty verdict, swiftly begets impediments to finality. Congress[2] and the courts[3] have expressed the public's right to speedy justice. It is an increasingly empty right when well-financed, convicted defendants attempt to prolong the final day of reckoning by abusing the post-conviction relief process.

Defendants Provenzano, Thomas Andretta, Stephen Andretta and Gabriel Briguglio were indicted on February 22, 1979 and were brought to trial within the time mandated by Congress in the Speedy Trial Act. After a three-week public trial they were all convicted by a jury on May 25, 1979. On July 3, 1979, Provenzano moved for an evidentiary hearing with respect to an alleged violation of the court's jury sequestration order. The other defendants joined in the motion. On July 6, 1979 after a hearing on the motion, the court denied Provenzano's request for leave to question members of the jury. Four days later, on July 10, 1979, the court denied all defendants' applications to vacate the

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2. See the legislative history of the Speedy Trial Act of 1974, H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7404 *et seq.*; Lite, *The Pre-Accusation Delay Dilemma*, 10 Seton Hall L. Rev. 539, 554 (1980).

3. *See e.g., Strunk v. United States*, 412 U.S. 434 (1973); *Barker v. Wingo*, 407 U.S. 514 (1972).

jury verdict and to enter judgments of acquittal, and sentenced them. After sentencing Provenzano and Thomas Andretta each to twenty years' imprisonment and fines of $20,000, the court denied them bail pending appeal and ordered them remanded to custody. Provenzano and Thomas Andretta then sought an order from the Court of Appeals for the Third Circuit releasing them, which was denied on August 21, 1979, *United States v. Provenzano*, 605 F.2d 85 (3d Cir. 1979).

All defendants appealed their convictions. While the appeal was pending, Provenzano, Thomas Andretta and Briguglio moved for a new trial or expansion of the trial record. Provenzano also moved for the recusal of the trial judge for the purpose of hearing the new trial motion.[4] On September 21, 1979, Provenzano withdrew his recusal motion and, after a hearing, the court denied the defendants' new trial motions. Three days later, on September 24, 1979, Provenzano filed a notice of appeal from the court's denial of his motion for a new trial. On September 28, 1979, Thomas Andretta and Briguglio filed similar notices of appeal. On May 8, 1980, the Court of Appeals denied the consolidated appeals of Provenzano and both Andrettas, *United States v. Provenzano*, 620 F.2d 985 (3d Cir. 1980).[5] Those defendants petitioned the United States Supreme Court for a Writ of Certiorari which was denied on October 14, 1980, 49 U.S.L.W. 3220.

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4. The Court of Appeals remanded the matter to the district court during the pendency of the appeal of the convictions, solely for the purpose of allowing the district court to rule on the new trial motions.

5. The complex and convoluted history of Briguglio's numerous appeals is set forth in the opinion of this court denying that defendant's motion for a new trial. *United States v. Provenzano*, Cr. No. 79-72 (D.N.J. July 1, 1981).

Opinion

On January 13, 1981, Provenzano filed a notice of motion pursuant to Fed.R.Crim.P. 33 for an order granting a new trial on the basis of newly discovered evidence. Stephen Andretta filed the same motion on January 16, 1981 and Thomas Andretta joined on March 18, 1981. After repeated requests by Provenzano for adjournment of the hearing date, on May 11, 1981 this court heard argument on defendants' motions and reserved decision. Less than one week later, Provenzano's attorney contacted the court and requested that decision on the motion be withheld because he intended to file a motion for the court's recusal. On June 5, 1981, Provenzano filed the recusal motion. Neither of the Andrettas joined in that motion. After a hearing on June 22, 1981, the recusal motion was denied. While decision was reserved on the Rule 33 motions, the court heard motions on July 27, 1981 by Thomas and Stephen Andretta to reduce their sentence. Thomas Andretta's motion was denied and Stephen Andretta's motion was granted.

It is now more than two years since the defendants in this case were convicted of violating the federal racketeering laws. This court must now rule upon motions by Anthony Provenzano, Thomas Andretta and Stephen Andretta (hereafter collectively "Provenzano") for a new trial based upon "newly discovered evidence." The evidence which is alleged to be newly discovered is (a) two FBI 302 investigative reports, (b) documents from the file of a United States Magistrate and Clerk's docket sheet detailing the issuance of a complaint charging witness Ralph Picardo with escape, and the warrant of arrest for that escape issued out of this district, and (c) Picardo's testimony in a later trial, allegedly inconsistent with his testimony in the instant case.[6]

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6. No one involved with this case disputes that Picardo, a federally-protected witness, was the key prosecution witness. The Court of Appeals noted that the only direct proof of Provenzano's participation in the conspiracy came from Picardo's testimony. *United States v. Provenzano, supra,* 620 F.2d at 999.

Opinion

THE 302s

Provenzano contends that the 302s were not turned over to the defendants under the court's *Brady* order, *see Brady v. Maryland*, 373 U.S. 83 (1967), and that they contain information which, had counsel been aware, could have been used to impeach the credibility of Picardo with respect to an alleged trip to Miami, Florida in late 1973. It was during the Miami trip that Picardo claimed he discussed "labor peace" involving his company, Lift-Van, with Provenzano.

One 302 recounts an investigation by FBI Agent Smith on January 15, 1976 during which an executive of a sporting goods store at the Americana Hotel was interviewed with regard to whether Provenzano or Picardo had made purchases of clothing during the time when Provenzano was allegedly at the hotel. A review of sales receipts indicated no such sale nor did the executive recall seeing Provenzano, with whom he was acquainted. The 302 concludes: "It should be noted that the records revealed numerous cash sales where no names were obtained."

The other 302 details an investigation by FBI Agent Sullivan of Eastern Airlines' microfilm reservation records for the period November 8, 1973 through November 15, 1973 searching for reservations in the name of Andretta, Briguglio or Picardo from Newark to Miami or Ft. Lauderdale and return. No such names were found in the microfilm records. Sullivan interviewed the Past Date Records Clerk who advised "that it would have been possible to have obtained transportation via Eastern Airlines for the above indicated time period without having that information recorded on their microfilm reservation records."

Provenzano contends that these 302s were never produced to defense counsel, *see* Affidavits of Harvey Weissbard, Esq.

(Provenzano's present counsel), Jay Goldberg, Esq. and Gerald Shargel, Esq. (Provenzano's trial counsel), and that they are material to his defense. The Government asserts that the 302s were provided prior to trial, *see* Affidavit of Jeffrey Speiser, Special Attorney, Department of Justice (the Government's trial counsel). Provenzano contends that the 302s first surfaced in *Brady* material produced for the trial of Frank Tiari in the Southern District of New York in November 1980, approximately 18 months after the trial in the instant case. (Tiari and Provenzano retained the same trial counsel, Jay Goldberg.) Thus, Provenzano alleges that the evidence is newly discovered and should be the basis for a new trial. Provenzano further alleges that FBI Agent Smith, who testified as a defense witness, committed perjury or purposefully attempted to create a false impression when he didn't mention the interview with the sporting goods store executive and, thus, tried to mislead defense counsel and the jury concerning the extent of the FBI's investigation to verify Picardo's alleged trip to Miami.

THE "ESCAPE" DOCUMENTS

While in the Federal Witness Protection Program, Picardo was incarcerated for a time at a facility in Portland, Maine, where he was classified as a "trustee" and afforded certain privileges. On December 23, 1976, Picardo walked away from the facility. Upon being informed of the walkaway, Robert Stewart, then a Special Attorney with the Department of Justice who had been dealing with Picardo, notified William W. Robertson, then head of the Newark Strike Force, of the escape. Robertson had a complaint filed with United States Magistrate William J. Hunt on December 23, 1976 (Mag. No. 76-2134MG-2), charging Picardo with a violation of 18 U.S.C. §751(a) — Escape from custody, and requested that an arrest warrant issue. It was further ordered

that the complaint be sealed. Picardo was arrested the same date by two FBI agents in New York State after they received a teletype that a warrant had issued for his arrest. On February 9, 1977, 48 days after the escape, the United States Attorney in Portland, Maine declined prosecution of Picardo for the incident.

One of the FBI agents who arrested Picardo filed a 302 report of his complete investigation of the matter. That report was included in the *Brady* material turned over to defense counsel prior to trial. The report included reference to the declination of prosecution by the United States Attorney in Maine. Agent Cummings, who filed the report, was called as a defense witness as was Agent Bergholtz, the other arresting agent, to impeach Picardo after he testified that he had not escaped, but had merely left the facility thinking he had permission.

Provenzano contends that the Government's cross-examination of the arresting agents intended to convey the impression that the United States Attorney in Maine had accepted Picardo's version of the event and declined prosecution, thus freeing Picardo from any future difficulty arising out of the escape. Provenzano urges that the existence of the escape complaint filed with Magistrate Hunt, which was not dismissed until March 1978 upon application of Robert Stewart, was a "sword" over Picardo's head which created a motive for him to testify falsely at the trial. Inquiry by defense counsel into this area was precluded, Provenzano asserts, because the Magistrate's and Clerk's documents were not provided with the *Brady* material. These documents were unknown to defense counsel until they were produced for use in the Tiari trial.

Opinion

THE "AGREEMENT" ON PICARDO'S RETRIAL

The final ground upon which Provenzano asserts he is deserving of a new trial is that Picardo materially changed his testimony in the Tiari trial from the Provenzano trial testimony on the issue of what he understood his status was with regard to a retrial in Hudson County, New Jersey on a murder conviction which had been reversed. Provenzano alleges that Picardo perjured himself in the instant case when he said that he "hoped" he would not be retried, in light of his later testimony in the Tiari trial that he had "an agreement" not to be retired [sic].

Provenzano asserts that this false revelation of Picardo's state of mind at the trial went directly to his motivation to testify in a biased manner. The defendant contends that this motive to testify falsely went directly to an attack on Picardo's credibility. Provenzano argues:

> Knowledge that the prosecuting authorities are holding out the certainty of freedom from a charge of murder creates an incentive of the highest order to support the prosecution's case. It is many orders of magnitude greater than a mere "hope" that such a retrial will not take place.

Defendant's Supplemental Brief in Support of the Motion at 4.

EVIDENTIARY HEARING

An evidentiary hearing need not be held in every case where a defendant seeks a new trial on the basis of newly discovered evidence. *United States v. Johnson*, 327 U.S. 106, 112 (1946); *United States v. Herman*, 614 F.2d 369, 372 (3d Cir. 1980). A motion for a new trial ordinarily may be decided on affidavits without a hearing. Where such a hearing is ordered, it is because

of certain unique situations, typically involving allegations of jury tampering, prosecutorial misconduct or third party confession. *United States v. Hamilton*, 559 F.2d 1370, 1373 (5th Cir. 1977).

Here, the motion is before the trial judge who is fully familiar with the record as it was developed at trial and with the material produced by the Government under the *Brady* order. *See United States v. Johnson, supra; United States v. Iannelli*, 528 F.2d 1290, 1294 (3d Cir. 1976). Affidavits have been submitted by Provenzano's attorneys and by Jeffrey Speiser and Robert C. Stewart for the Government. The Affidavits of Messrs. Goldberg and Shargel, the trial counsel, merely state that they never received the 302s of FBI Agents Smith and Sullivan. The Affidavit of Mr. Weissbard, Provenzano's present counsel, asserts that "defense counsel were totally unaware" of the escape complaint and outstanding arrest warrant which were not dismissed until 15 months after the escape. Weissbard Affidavit at ¶18. The Weissbard Affidavit further asserts, at ¶9:

> Mr. Goldberg has advised me that in his opinion these non-disclosed materials were extremely important and could have been used quite effectively by him. . . . if he had known of and been able to develop the additional material concerning the Florida trip the jury might very well have been convinced that the trip did not take place and that Picardo was not to be believed concerning defendant Provenzano's participation in the crime.[7]

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7. The Court of Appeals recognized that Provenzano's connection to the conspiracy did not rely entirely on Picardo's testimony about the Florida trip. For example, payments to the Rainbow's End Horse Farm by Picardo for upkeep

(Cont'd)

Opinion

The Affidavit of Mr. Speiser, the Government's trial counsel, asserts that he turned over the disputed 302s to defense counsel. He also states that a specific file of materials which he turned over to defense counsel was given to Assistant U.S. Attorney Nicholas Ackerman in the Southern District of New York. Ackerman was an attorney for the Government in the Tiari trial. Speiser asserts that Ackerman told him that all reports about Picardo which were turned over to the Tiari defense counsel were obtained from Speiser.

The Stewart Affidavit relates the account of filing the escape complaint and securing the arrest warrant for Picardo after he left the Maine facility. The Affidavit further states that Magistrate Hunt raised the matter of the outstanding warrant and complaint when Stewart was with him on an unrelated matter. Stewart asserts that he immediately arranged with Robertson to have the outstanding warrant and complaint dismissed. Stewart also states that he believes that (i) Picardo was never aware of the outstanding warrant and complaint, (ii) Speiser was never aware of the facts surrounding the outstanding warrant and the method by which it was dismissed, and (iii) "No one ever entertained any thought of prosecuting Mr. Picardo on the charges contained in that warrant after a declination of prosecution was issued following his arrest."

In addition to the above affidavits, the court has had the benefit of trial transcripts as well as documents produced for the

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(Cont'd)
of the horse of Provenzano's daughter, Doreen, were corroborated by the testimony of the horse farm owner. *See United States v. Provenzano, supra,* 620 F.2d at 1000.

trial of *United States v. Nunzio Provenzano*, Cr. No. 80-315 (D.N.J.), where Picardo testified about many of the same matters which impact upon his credibility. This court is confident that it has all the material and relevant evidence before it and that no further evidentiary hearing is necessary to decide the instant motion.

THE STANDARDS

Motions for a new trial based upon newly discovered evidence are addressed to the sound discretion of the trial court. *United States v. Iannelli, supra; United States v. Lombardozzi*, 343 F.2d 127, 128 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965). In *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978), *cert. denied sub nom. LaDuca v. United States*, 440 U.S. 972 (1979), the Court of Appeals for the Third Circuit reaffirmed the five essential requisites of the so-called "Berry" test, or "probability" test which a defendant must meet prior to the grant of a new trial.[8] The *Rocco* Court held that the defendant "bears a heavy burden" of establishing that:

> (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial;
>
> (b) facts must be alleged from which the court may infer diligence on the part of the movant;

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8. The "Berry" test was first adopted by the Third Circuit in *United States v. Bertone*, 249 F.2d 156, 160 (3d Cir. 1957). *See also, United States v. Herman*, 609 F.2d 369 (3d Cir. 1980); *United States v. Iannelli, supra*, 528 F.2d at 1292-93; *United States v. Meyers*, 484 F.2d 113, 116 (3d Cir. 1973).

(c) the evidence relied on, must not be merely cumulative or impeaching;

(d) it must be material to the issues involved; and

(e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

587 F.2d at 146.

In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court held that where the prosecution's case included perjured testimony, and that the prosecution knew or should have known of the perjury, the undisclosed information is material if "there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103. The *Agurs* Court further held that where a defendant has made a specific request for information and the prosecutor has failed to turn over that information, the test for materiality is whether "the suppressed evidence might have affected the outcome of the trial." *Id.* at 104.

Provenzano urges that a new trial be granted because FBI Agent Smith committed perjury or purposefully attempted to create a false impression when he failed to disclose his investigation of the sporting goods store, about which information was contained in the allegedly missing 302. A close reading of the trial testimony, T2581-2601, reveals that Provenzano's counsel, Mr. Goldberg, began his direct examination by asking Smith whether he was asked to conduct a review of registration cards of the Americana Hotel in February 1976. T2582. That information was contained in a 302 report which all parties agree

was produced in the *Brady* material. The entire Smith examination related to the February 1976 review of the registration cards. Defense counsel asked Smith if he ever went back to the Americana to do a further investigation after February 1976 until he left Miami in February 1978. T2598. Smith did not. T2599.

The problem is that the allegedly undisclosed 302 indicates that Smith made an investigation prior to the February 1976 review of the registration cards. When counsel asked whether he made a later investigation, he literally spoke the truth when he answered "No". T2598. Counsel suggested that if Smith was directed to go to the hotel and look for records other than registration cards for evidence of Provenzano and Picardo being there, that he would be compelled to do so, T2594, and Smith agreed. However, counsel never followed up that suggestion to ask Smith if he had ever made any investigation other than the registration cards. Smith was called as a defense witness. Whether counsel interviewed him prior to his testimony is unknown. If they did, perhaps they had some reason for not pursuing that line of questions.[9] If they did not, hindsight indicates perhaps they should have.

The Speiser Affidavit asserts that the Smith 302 was provided to counsel with the other *Brady* material. Assuming, *arguendo*, that it was not produced, in light of the voluminous documents containing material which could be used to impeach Picardo that were produced, any non-disclosure was clearly inadvertent. Agent

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9. Counsel were aware of information which corroborated Picardo's testimony about the Florida trip. Stephen Andretta appeared before a grand jury in Michigan and gave testimony about a trip he took with Picardo to Miami in late 1973 where he had certain conversations with Provenzano. The transcript of that grand jury testimony was provided to counsel as part of the Government's pretrial compliance with the court's *Brady* order.

Smith had no motive to testify falsely. He had to assume that his 302 of the earlier investigation of the sporting goods store was provided to counsel and, if they had any questions about that investigation he would be examined about it. To allege that Agent Smith was purposefully attempting to mislead counsel and the jury by withholding information about the earlier investigation, when he was never asked about it, and to expect him to volunteer information beyond the scope of the question, is to urge an unwarranted extension of due process principles and infringe upon the fundamental nature of the adversary system. *Cf. United States v. Iverson,* 637 F.2d 799, 806 (D.C. Cir. 1980) (Tamm, J., dissenting).

Smith certainly testified within the letter of the truth. *See United States v. Lasky,* 548 F.2d 835, 839 (9th Cir.), *cert. denied,* 434 U.S. 821 (1977). His testimony clearly does not rise to the level of perjury as Provenzano contends. In *Bronston v. United States,* 409 U.S. 352, 360 (1973), the Supreme Court held that the perjury statute, 18 U.S.C. §1621,

> is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner — so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.

(citations omitted).[10] Here, the specific object of inquiry was the effort made by the FBI to verify Picardo's alleged trip to Florida.

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10. *See also,* Anno. "Incomplete, misleading or unresponsive but literally true statement as perjury," 69 A.L.R.3d 993 (1976).

Opinion

Four highly skilled defense attorneys cross-examined Smith. Other questions could have been asked; they never were.

Assuming that counsel had elicited testimony about the earlier investigation by Agent Smith, would it have revealed material information? The allegedly undisclosed 302 contains totally inconclusive information on the issue whether Picardo bought clothing at the sporting goods store — many receipts were for cash and contained no names. Likewise the allegedly undisclosed 302 of Agent Sullivan is inconclusive as to airline reservations. The strongest argument that the defendants had to impeach Picardo about the Florida trip was the review of the reservation cards, particularly in light of Picardo's testimony that Provenzano was registered as a guest. T593. Defense counsel examined and cross-examined Smith repeatedly about that investigation. Any information derived from the allegedly undisclosed 302s would have been merely repetitious and cumulative, if any inference could be drawn from them at all, on the issue of the FBI's failure to verify the Florida trip. A conviction need not be vacated because such evidence has not been revealed to the defendant. *United States ex rel. Marzeno v. Gengler,* 574 F.2d 730, 735 (3d Cir. 1978). Moreover, in summation, Provenzano's counsel noted the fact that the Government failed to verify the Florida trip through any airline records. It seems clear that under either *Agurs* standard of materiality, the allegedly undisclosed 302s contained information which would have had no effect on the outcome of the trial.

As for the alleged failure to provide counsel with the Clerk's docket sheet and Magistrate's documents relating to the escape complaint and arrest warrant, Provenzano's argument is specious. Picardo was in Government custody pursuant to a Writ of Habeas Corpus Ad Testificandum issued by this court in November 1975 compelling him to appear before a grand jury in this district. He

was temporarily confined in Bangor, Maine pending completion of his testimony before the grand jury. Arguably, Picardo's escape could be prosecuted in either the district where the offense occurred, Maine, *see* U.S. Const. Art. III, §2, cl. 3; 18 U.S.C. §3231; Fed.R.Crim.P. 18; *United States v. Cores*, 356 U.S. 405, 407 (1958), or in the District of New Jersey from where the Writ issued.

The United States Attorney in the District of Maine declined prosecution 48 days after the incident. This information was provided to defense counsel with the *Brady* material. Moreover, even if Picardo knew of the outstanding District of New Jersey warrant and complaint before it was dismissed, no prejudice could inure to Provenzano because the dismissal occurred approximately 14 months *prior* to Provenzano's trial, thereby giving Picardo no motive to testify falsely due to the threat of prosecution for escape.[11] Defense counsel had the FBI 302s detailing the escape. Both Agents Cummings and Bergholtz testified that Picardo had escaped and was arrested pursuant to a warrant, T2572-2581; T2651-2662. It seems quite clear that any material information about the escape was provided prior to trial, and the allegedly undisclosed docket sheet and magistrate's documents reveal information which could have had no effect on the outcome of the trial.

Provenzano contends that Picardo committed perjury when he testified as follows:

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11. Picardo testified in this district in *United States v. Nunzio Provenzano*, Cr. No. 80-315 (D.N.J.) on March 24, 1981 that, as of April 1977, the time he was granted bail in Hudson County, he did not know whether a federal escape charge had been filed against him. T4.80. By that date, of course, prosecution had been declined in Maine.

> Q. [by Mr. Goldberg] Is it not a fair statement that it is your hope that you'll never have to stand trial for that murder case?
>
> A. That's correct, sir.

T655. This testimony is contradicted, urges Provenzano, by Picardo's testimony in the Tiari trial:

> Q. [by the Government attorney] In connection with that cooperation [with the State of New Jersey], do you have an understanding with respect to your retrial on the murder charge?
>
> A. Yes, I do.
>
> Q. What is your understanding?
>
> A. That I won't be retried again.

T1662. Supplemental Brief of Defendant in Support of Motion at 2. There was colloquy between Picardo and the court in the Tiari trial:

> The Court: I think the question is at this time [April '77] did you believe that if your appeal was successful and even if in terms the higher court ordered a retrial did you understand that in fact you were not going to be retried?
>
> The Witness: The answer to that, sir, is yes.

If Picardo committed perjury, Provenzano contends that a new trial is warranted under the rule of *Larrison v. United States,*

24 F.2d 82, 87 (7th Cir. 1928), and that the five-part newly discovered evidence standard does not govern in situations involving perjury by a key prosecution witness. The *Larrison* Rule holds that a new trial should be granted when

> (a) The court is reasonably well satisfied that the testimony given by a material witness false.
>
> (b) That without it the jury *might* have reached a different conclusion.
>
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial.

Id. at 87-88 (emphasis in the original).[12] The *Larrison* Rule has been recognized by the Third Circuit in *United States v. Meyers*, 484 F.2d 113 (3d Cir. 1973). But in *Meyers* the court held that the conduct of the witness was so egregious that a new trial was warranted under that standard *or* the so-called "Berry" or "probability" test. *Id.* at 117. No case in this circuit has expressly granted a new trial under the *Larrison* Rule.

The *Larrison* Rule, or "possibility" test, recently has been criticized by both the Second Circuit, *United States v. Stofsky*, 527 F.2d 237, 245-46 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), and the Ninth Circuit, *United States v. Krasny*, 607 F.2d 840, 846 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980). Both

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12. It is clear that the test is conjunctive, and that a finding of inability to meet any part would preclude its imposition.

Stofsky and *Krasny* opt for the probability standard rather than the *Larrison* Rule, even when the testimony is shown to have been perjured. *See Krasny*, 607 F.2d at 844-45, where the court held "the probability standard is appropriate for determining whether perjury requires a new trial, . . . at least when the government did not knowingly or negligently use the perjured testimony." (Citations omitted.)

This court must decide (i) whether Picardo's testimony on this issue was perjured, and (ii) if so, whether to apply the *Larrison* Rule or the probability standard.

There is no doubt of the fact that prior to the reversal of Picardo's murder conviction in 1977, two Deputy Attorneys General of the State of New Jersey questioned him in the presence of a federal agent while Picardo was incarcerated in federal custody in San Diego. The summary of that interrogation was included in the *Brady* material provided to defense counsel prior to Provenzano's trial. It contained information to the effect that Picardo was told by the Deputy Attorneys General that if he were granted a reversal, it was unlikely he would be retried. Provenzano's counsel questioned Picardo directly about his meeting in San Diego. T655-656. Picardo testified that he hoped that he would not be retried.

The fact that Picardo testified later, in the Tiari trial, that he had an agreement with New Jersey not to be retried does not compel the conclusion that he lied in the instant case. Nor is that conclusion compelled by Picardo's earlier testimony at Provenzano's trial in Ulster County, New York, where Provenzano was convicted of murder.[13] According to incomplete transcripts

13. That conviction was reversed and a new trial was granted by the New York Supreme Court, Appellate Division, approximately two weeks after (Cont'd)

provided to the court by Provenzano's attorney after the hearing on the instant motion, Picardo testified that he was "awaiting retrial" of his Hudson County murder charge. *People v. Provenzano*, T434, June 5, 1978.

That statement in the Ulster County trial, that Picardo was "awaiting retrial" in New Jersey, was literally true despite what Picardo might have understood to be the assertions of the New Jersey Deputy Attorney General who interviewed him in San Diego in 1977. The State of New Jersey intends to retry Picardo in Hudson County. *See* transcript of hearing before the Hon. Thomas O'Brien, J.S.C., in Superior Court, Hudson County in *State v. Picardo*, Ind. No. 1153-73 at 44, marked for identification in the trial of *United States v. Nunzio Provenzano*, Cr. No. 80-315 (D.N.J.), transcript of April 15, 1981 at 19.95. On August 31, 1981, this court was advised by Judge O'Brien that an attempt to move the retrial was made in July 1981, but due to a shortage

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(Cont'd)

Provenzano's trial here. *People v. Provenzano*, 417 N.Y.S.2d 317 (App. Div. 1979). Provenzano had been represented at trial in that case by Maurice Edelbaum, Esq., one of his attorneys on the instant motion. On appeal, Provenzano was represented by Jay Goldberg, Esq. and Gerald Shargel, Esq., who represented him at trial in this case, as well as by John Pollok, Esq., trial attorney here for codefendant, Thomas Andretta.

After the reversal, the New York Court of Appeals granted the prosecution's request for review and, in turn, reversed the Appellate Division. *People v. Provenzano*, 429 N.Y.S.2d 562 (Ct. App. 1980). Provenzano was represented at the Court of Appeals by Edelbaum, Goldberg, Shargel and Pollok. The case was remanded to the Appellate Division for consideration of Provenzano's arguments which had not been reached previously. On remand, the Appellate Division affirmed the conviction of Provenzano, *People v. Provenzano*, 435 N.Y.S.2d 369, 371 (1980). He was represented on remand by Edelbaum, Shargel and Pollok. The New York Court of Appeals seemingly has ended the litigation by denying Provenzano's petition for certiorari on April 10, 1981.

of judges at that time it was rescheduled and should proceed in September 1981.

Unless Picardo is a fool, which this court is absolutely certain he is not, he was telling the truth here when he testified that he "hoped" not to be retried. Logic would be tortured beyond recognition to conclude differently; no one hopes to be retried for murder. In fact, Picardo testified under cross-examination by Mr. Goldberg: "I don't think anybody in his right mind would want to [stand trial for murder again]." T493.

In testifying later, in the Tiari trial, that he had an understanding that he would not be retried, Picardo, at worst, misunderstood the assertions of the Deputy Attorney General in San Diego — more likely, he accurately answered the question which focused on the period prior to the reversal of his conviction.

At oral argument on the instant motion, the Government conceded that it had an obligation to come forward and reveal that Picardo had an understanding with the State of New Jersey not to be retried, *if* it had knowledge that such an agreement existed. The attorneys for the Government have maintained from the outset of this prosecution that they were unclear as to what understandings or agreements, if any, Picardo may have had with the State of New Jersey. They made their confusion crystal clear to defense counsel prior to trial in this matter. This court has no reason to doubt the truth of the Government's assertions. *See* transcript of the hearing on the instant motion, T54-T58 (May 11, 1981).

What is vitally important is that the Government provided in the *Brady* material the summary of the meeting between Picardo and the New Jersey Deputy Attorneys General. That summary,

designated J-80-W, sets forth the names of the interviewers — Hall, a member of the New Jersey State Police Intelligence Bureau, and Bozza, a Deputy New Jersey Attorney General — as well as the fact that FBI Special Agent James Kosler was present. The summary, drafted by Hall, states in pertinent part:

> The case concerning Trombetta [victim of the Hudson County murder] is currently in the appeal courts. According to Picardi's [*sic*] Attorneys, FBI sources and DAGs Palleria and Bozza, Picardi [*sic*] will probably win the appeal and there is a good possibility that he would not stand trial again.

Provenzano's counsel had this information long before trial; it is certainly not newly discovered. It is well settled that evidence is not newly discovered when it was known or could have been known by the diligence of the defendant or his counsel. *United States v. Provenzano, supra,* 620 F.2d at 997; *United States v. Bujese,* 371 F.2d 120, 125 (3d Cir. 1967).

If, indeed, as Provenzano now asserts, the information conflicted with Picardo's earlier testimony in Ulster County, Provenzano's counsel had the opportunity prior to the instant trial to seek out those state and federal government agents referred to in the summary — Hall, Bozza, Palleria and Kosler — and determine if there was a deal with the State of New Jersey. This court is unaware of any efforts by defense counsel to interview these government agents; certainly none were called as witnesses. These deliberate tactical decisions by counsel are binding on the defendants, *United States v. Provenzano, supra,* 620 F.2d at 997; *see also United States v. Hoffer,* 423 F. Supp. 811, 817 (S.D.N.Y. 1976), *aff'd mem.,* 556 F.2d 566 (2d Cir. 1977), and the failure to pursue the issue may well constitute a waiver by the defendants

to allege any error based upon the missed opportunity. *See United States v. Harris,* 498 F.2d 1164, 1170 (3d Cir. 1974).

Moreover, Picardo's arrangements about retrial, if such ever existed, could not be affected by how he testified in Provenzano's trial here, because his agreement with the federal government, which was completely disclosed to counsel, did not impact on the retrial — only upon his possible parole or clemency if he were convicted anew. T415-416.

It is quite clear that Picardo's response, "That's correct, sir.", to Mr. Goldberg's question, "Is it not a fair statement that it is your hope that you'll never have to stand trial for that murder case?", T655, was a literally truthful statement. *See Bronston v. United States, supra.* It is most interesting that the word "hope" was not chosen by the witness, but by Provenzano's counsel. Likewise, in the Tiari trial, the word "understanding" was not chosen by the witness, but by the government attorney.

In any event, if the statement in response to Mr. Goldberg's question in this case was not truthful, there is no reason for the court to believe that the prosecution had any knowledge of its falsity. On the contrary, the Government has asserted from the outset, and Picardo has so testified, that there has been no federal interference with a scheduled retrial, *see* transcript of trial of *United States v. Nunzio Provenzano,* T2.63 (March 20, 1981), and that if he had any "agreement", it was with the State of New Jersey, *id.* at T4.98.

This court finds that Picardo's statement that he "hoped" not to be retried was a true statement. Without a finding that the statement of the witness was false, the *Larrison* Rule does not become effective. At best, Provenzano must abide by the

probability test if the statement in the Tiari trial can be considered newly discovered, because the statement only can be used to impeach Picardo. *See United States v. Gabriel*, 597 F.2d 95, 99 (7th Cir. 1979).

Provenzano contends that the statement could be used to impeach Picardo. The general rule on motions for a new trial as to newly discovered evidence which reveals *untrue* statements by a Government witness, is that new evidence which is merely cumulative or impeaching is not an adequate basis for the grant of a new trial. *Mesarosh v. United States*, 352 U.S. 1 (1956). Furthermore, the Supreme Court has refused to hold that any subsequently discovered *inaccuracy* in the testimony of an important trial witness, which might have affected his credibility in the eyes of the jury, would entitle a convicted defendant to a new trial. *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 357 (1963).

The disputed statement was a tiny part of an extensive cross-examination which vigorously and exhaustively attacked Picardo's credibility. Picardo testified to falsifying documents, using drugs, gambling, philandering, cheating on his taxes, and a willingness to do virtually anything to protect himself. The alleged inconsistency in his testimony "pales into total insignificance as impeachment when considered against a backdrop of all the other impeaching evidence the jury had before it." *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979). Moreover, the jury was instructed to receive Picardo's testimony with caution. Jury charge at 21-23. *See United States v. Runge*, 593 F.2d 66, 74 (8th Cir.), *cert. denied*, 444 U.S. 859 (1979). There is no possible way to conclude that at a new trial, evidence of the newly discovered "inconsistent statement" would probably produce an acquittal. *See United States v. Davilla*, 428 F.2d 465, 466-67 (9th Cir. 1970).

Opinion

CONCLUSION

The defendants have been speedily and publicly tried. They were convicted. By continually shifting focus, Provenzano has successively attacked his bail status pending appeal and his conviction on multiple legal theories. He has twice sought recusal of the trial judge. He has cast aspersions on the considerable abilities of his trial counsel, and he has attempted to interject wild speculation about personal vendettas against him by the Government relating to investigations far removed from this matter. *See* transcript of the hearing on the instant motion.[14] These types of attacks sometimes continue for years.[15]

With the realization that this opinion now becomes the basis for yet continued appellate review, this court concludes that the allegation that Agent Smith perjured himself in not divulging the investigation of the sporting goods store receipts is unsupported by the law. Likewise unsupportable by the law, as well as the facts, is Picardo's alleged perjury in making a statement in the Tiari trial regarding his retrial, allegedly inconsistent with the statements made in this case. The information contained in the allegedly undisclosed 302s, and in the District of New Jersey documents relating to Picardo's escape in Maine, is wholly

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14. In an attempt to determine if this motion was the final chapter in this continuing drama, the court inquired of Provenzano's attorney whether there were any further post-conviction motions contemplated. The answer was equivocal. Transcript at 74.

15. *See United States v. Provenzano*, Cr. No. 429-60 (D.N.J.), where examination of the Clerk's docket reveals that seven years elapsed between indictment and final affirmance by the appellate courts. Four of those years were after the conviction.

inconclusive at best, and is merely cumulative to other, much stronger, impeachment testimony in the record.

There is no indication that the Government attorneys withheld any information from defense counsel which was "material" to the issues under any tier of the *Agurs* standard. Although Provenzano alleges multiple non-disclosures of information which he specifically requested, *see DeMartino v. Weidenburner,* 616 F.2d 708, 713-14 (3d Cir. 1980), it is clear to this court that none of the information allegedly non-disclosed would have had any effect on the outcome of the trial, nor is there a reasonable likelihood that the verdict would have been different. Provenzano has not met his "heavy burden", *United States v. Rocco, supra,* 587 F.2d at 146.

As Justice Jackson stated in *Stein v. New York,* 346 U.S. 156, 197 (1953), "The petitioners have had a fair trial and fair review. The people . . . are also entitled to due process of law." The motions for a new trial are denied. The Government shall submit an appropriate order.

DATED: September 4, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

CONSTITUTION OF THE UNITED STATES:

"Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS:

"28 U.S.C. §455

§455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) 'fiduciary' includes such relationships as executor, administrator, trustee, and guardian;

(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

Constitutional and Statutory Provisions

(i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of basis for disqualification."